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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION

13
14 UNITED STATES OF AMERICA,
15 Plaintiff,

16 v.

17 ASPEN VENTURES WEST II, L.P.

18 Defendant.
19
20

E-filing

ORIGINAL
FILED

JUN 29 2006

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

FILED
DISTRICT COURT OF GUAM

OCT 19 2006 nba

MARY L.M. MORAN
CLERK OF COURT

06-00030

C06-04034

Civil Case No.

Complaint for Receivership
and Injunction

RMW

RS

21 COMPLAINT FOR RECEIVERSHIP AND INJUNCTION

22 COMES NOW Plaintiff, the United States of America, on behalf of its agency, the
23 United States Small Business Administration, and for its cause of action states as follows:
24

25 PARTIES, JURISDICTION, AND VENUE

26 1. This is a civil action bought by the United States on behalf of its agency, the U.S.
27 Small Business Administration (hereinafter, "SBA," "Agency," or "Plaintiff"), whose central
28

COMPLAINT FOR RECEIVERSHIP AND INJUNCTION

1 office is located at 409 Third Street, S.W., Washington, DC 20416. The Defendant has
2 consented to the requested relief.

3 2. Jurisdiction is conferred on this Court pursuant to sections 308(d), 311, and 316
4 of the Small Business Investment Act, as amended; 15 U.S.C. §§ 687(d), 687c, 687h; the Small
5 Business Act, 15 U.S.C. § 634(b)(1); and 28 U.S.C. § 1345.

6 3. Defendant, Aspen Ventures West II, L.P. (hereinafter "Aspen II," "Licensee," or
7 "Defendant"), is a Delaware limited partnership formed on or about September 29, 1994 that
8 maintains its principal place of business at 1000 Fremont Avenue, Suite 200, Los Altos,
9 California 94024. Venue is proper under 15 U.S.C. §§ 687(d), 687h and 28 U.S.C. § 1391(b).

11 **STATUTORY AND REGULATORY FRAMEWORK**

12 4. The purpose of the Small Business Investment Act of 1958, as amended,
13 (hereinafter the "Act") is to improve and stimulate the national economy, and small businesses in
14 particular, by stimulating and supplementing the flow of private equity capital and long-term
15 loan funds which small businesses need for sound financing of their operations and growth. 15
16 U.S.C. § 661.

17 5. Congress authorized the SBA to carry out the provisions of the Act and to
18 prescribe regulations governing the operations of Small Business Investment Companies
19 (hereinafter "SBIC"). 15 U.S.C. § 687(c). SBA duly promulgated such regulations, which are
20 set forth at Title 13 of the Code of Federal Regulations, Part 107 (hereinafter the "Regulations").

21 6. An SBIC is a corporation, a limited liability company, or a limited partnership
22 organized solely for the purpose of performing the functions and conducting the activities
23 contemplated under the Act. 15 U.S.C. § 681(a). SBA is responsible for licensing SBICs. *Id.* at
24 § 681(c).

1 7. An SBIC has the authority to borrow money, issue securities, promissory notes, or
2 other obligations under such conditions and limitations as regulated by SBA. SBA is
3 authorized to provide Leverage to SBICs through the purchase, or guarantee of payment, of
4 debentures or participating securities issued by SBICs. 15 U.S.C. §§ 683(a) and (b).

5
6 8. Leverage provided to an SBIC in the form of Participating Securities is subject to
7 the Regulations, including but not limited to the provisions of 13 C.F.R. §§ 107.1820-1850 and §
8 107.507. Section 107.1830 of the Regulations sets forth the maximum amount of capital
9 impairment that an SBIC licensee may have based on the percentage of equity capital
10 investments in its portfolio and its ratio of outstanding leverage to leverageable capital.

11
12 9. If an SBIC violates, or fails to comply with, any of the provisions of the Act or
13 Regulations, all of its rights, privileges, and franchises may be forfeited and the company may be
14 declared dissolved. 15 U.S.C. § 687(d).

15 10. Section 311 of the Act provides that if SBA determines that an SBIC licensee has
16 engaged, or is about to engage, in any act or practices which constitute, or will constitute, a
17 violation of the Act or Regulations, the SBA may seek, from the appropriate United States
18 District Court, an order enjoining such act or practices, and upon a showing by the SBA that
19 such licensee has engaged, or is about to engage, in any such act or practices, a permanent or
20 temporary injunction, restraining order, or other order, shall be granted without bond. In
21 addition, the Court is authorized to appoint SBA to act as receiver for such licensee. 15 U.S.C. §
22 687c.
23

24 **STATEMENT OF FACTS**

25 12. Paragraphs 1 through 11 are incorporated herein by reference.
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27
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1 13. SBA licensed Defendant as an SBIC pursuant to 15 U.S.C. § 681(c) on or about
2 November 8, 1994, under SBA License No. 0979-0400, solely to do business under the provision
3 of the Act and the regulations promulgated thereunder.

4 14. Defendant's general partner is Aspen Ventures West Management Company, L.P.

5 15. Defendant's Limited Partnership Agreement acknowledges that Defendant was
6 required at all times to be operated in accordance with the Act and Regulations.
7

8 16. In accordance with Section 303 of the Act, SBA provided funds to Defendant
9 through the purchase and/or guaranty of Participating Securities, a form of Leverage, as those
10 terms are defined under the Regulations. To date, a principal balance of \$19,460,064 of such
11 Participating Securities remains outstanding as follows:
12

<u>Loan Number</u>	<u>Principal Balance</u>	<u>Date Disbursed</u>	<u>Rate</u>
02008451-10	2,210,064.00	08-28-96	7.350
02011651-09	1,000,000.00	02-26-97	8.080
02012051-08	4,000,000.00	05-28-97	8.310
02012052-06	700,000.00	08-27-97	7.850
02012053-04	2,000,000.00	05-29-98	7.250
02012054-02	2,300,000.00	06-19-98	7.250
02017851-07	450,000.00	06-19-98	7.100
02017852-05	1,000,000.00	09-25-98	7.250
02017853-03	1,500,000.00	02-26-99	8.540
02017854-01	1,050,000.00	06-16-99	8.540
02023651-01	350,000.00	06-16-99	8.540
02023652-10	1,000,000.00	12-03-99	9.017
02023653-08	650,000.00	06-06-00	8.449
02027151-10	350,000.00	06-06-00	8.449
02027152-08	<u>900,000.00</u>	11-14-00	7.640
	19,460,064.00		

1 18. Section 107.1830(c) of the Regulations requires that Defendant not have a
2 condition of Capital Impairment of greater than 60%, as that term is defined under the
3 Regulations.

4 19. Based on Defendant's financial statements (SBA Form 468) for the period ending
5 December 31, 2002, SBA determined that Defendant had a condition of Capital Impairment, as
6 that term is defined under the Regulations, of 217.2%.

7 20. By letter dated March 27, 2003, SBA gave Defendant an opportunity to cure its
8 condition of Capital Impairment within 15 days of the date of that letter. Defendant failed to
9 cure its Capital Impairment within the permitted time.

10 21. By letter dated April 15, 2003, SBA notified Defendant that it was being placed in
11 Restricted Operations and on or about April 25, 2003, SBA transferred Defendant to liquidation
12 status.

13 22. Based on Defendant's financial statements (SBA Form 468) for the period ending
14 December 31, 2005, Defendant had a Capital Impairment, as that term is defined under the
15 Regulations, of 291.02%.

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20 **COUNT ONE**

21 **CAPITAL IMPAIRMENT**

22 23. Paragraphs 1 through 22 are incorporated herein by reference.

23 24. To date, Defendant has failed to cure its condition of Capital Impairment, as
24 defined under the Regulations, and a balance of \$19,460,064 in Participating Securities
25 purchased by the SBA remains outstanding.
26
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1 25. Defendant's failure to cure its condition of Capital Impairment is non-compliance
2 with the terms of its Leverage and a violation of §107.1830(b) of the Regulations.

3 26. Defendant's failure to cure its condition of Capital Impairment is nonperformance
4 of the requirements of the Participating Securities as well as Defendant's Application for SBIC
5 License and a violation of § 107.507(a) of the Regulations.
6

7 27. SBA has determined that Defendant is not in compliance with the terms of its
8 Leverage due to its uncured condition Capital Impairment and, therefore, the Licensee is in
9 violation of §§ 107.1830(b) and 507(a) of the Regulations.

10 28. As a consequence of Defendant's violation of §§ 107.1830(b) and 507(a) of the
11 Regulations, the SBA is entitled to the injunctive relief provided under the Act, 15 U.S.C. §§
12 687(d) and 687c, including the appointment of the SBA as Receiver of Defendant.
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15 **PRAYER FOR RELIEF**

16 **WHEREFORE**, Plaintiff prays as follows:

17 A. That this Court grant injunctive relief, both preliminary and permanent in nature,
18 restraining Defendant, its managers, general partners, directors, officers, agents, employees, and
19 other persons acting in concert or participation therewith from: (1) making any disbursements of
20 Defendant's funds; (2) using, investing, conveying, disposing, executing, or encumbering in any
21 fashion, any funds or assets of Defendant, wherever located; and (3) further violating the Act or
22 the Regulations promulgated thereunder.
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24 B. That this Court determine and adjudicate Defendant's non-compliance with and
25 violation of the Act and the Regulations promulgated thereunder.
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1 C. That this Court, pursuant to 15 U.S.C. § 687c, take exclusive jurisdiction of
2 Defendant and all of its assets, wherever located, appoint the SBA as receiver of Defendant for
3 the purpose of marshaling and liquidating the assets of Defendant and satisfying the claims of
4 creditors as determined by the Court, and such other relief as contained in the Order filed
5 simultaneously herewith.
6

7 D. That this Court grant such other relief as may be deemed just and equitable.
8

9 Respectfully submitted,

10 KEVIN V. RYAN
11 UNITED STATES ATTORNEY

12 Dated: June 29, 2006 By: /s/ Edwin L. Joe
13 EDWIN L. JOE
14 SPECIAL ASSISTANT UNITED STATES ATTORNEY

15 Of Counsel:

16 BEVERLEY HAZLEWOOD LEWIS
17 TRIAL ATTORNEY
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9 Respectfully submitted.

10 KEVIN V. RYAN
11 UNITED STATES ATTORNEY

12 Dated: June 29, 2006 By:

13 Edwin L. Joe
14 EDWIN L. JOE
15 SPECIAL ASSISTANT UNITED STATES ATTORNEY

16 Of Counsel:

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